

FILED

JUN - 5 2013

FRESNO COUNTY SUPERIOR COURT

By _____ DEPUTY

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Cal. Gov't Code § 6103*

Attorneys for Petitioner and
Plaintiff COUNTY OF MADERA

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

COUNTY OF MADERA,

Petitioner and Plaintiff,

v.

CITY OF FRESNO, a California
Charter City; FRESNO CITY
COUNCIL, a body politic; and DOES 1
through 20, inclusive,

Respondents.

THE JOHN ALLEN COMPANY,
LLC., a California limited liability
company, and DOES 21 through 100,
inclusive,

Real Parties In Interest.

CASE NO. 13 CECG 00807

**EX PARTE APPLICATION FOR
TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION and/or
STAY; MEMORANDUM OF POINTS AND
AUTHORITIES (Code of Civ.Proc. § 527;
CCP § 1094.5; CCP§ 1085)**

DATE: June 6, 2013

TIME: 1:30 p.m.

DEPT. 61

**TO EACH PARTY AND TO THE COUNSEL OF RECORD FOR EACH
PARTY:**

YOU ARE HEREBY NOTIFIED THAT on June 6, 2013, at 1:30 PM, in Department
61 of this Court located at 1100 Van Ness Avenue, Fresno, California, Plaintiff/Petitioner,
County of Madera, will move the Court for an order restraining and enjoining

1 defendants/respondents and real party in interest and their employees, agents, and persons
2 acting with them or on their behalf, from further earth moving activities on the development
3 known as Phase 1 of the El Paseo development [El Paseo Project] pending affirmative proof of
4 compliance and proper enforcement of all the adopted mitigation measures as described
5 hereafter.

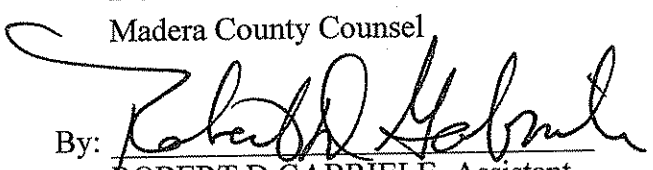
6 This application is made pursuant to the provisions of Code of Civil Procedure Section
7 527 on the grounds that Plaintiff/Petitioner, public and the environment under CEQA will
8 suffer harm and injury if defendant/respondent and real party in interest are not restrained and
9 enjoined from proceeding with the El Paseo Project unless and until the Court is reasonably
10 satisfied that past violations of the duty to enforce and document enforcement of the mitigation
11 measures are corrected and the respondent/defendant can be trusted by enforceable scheduling
12 and accountability to enforce compliance with the adopted mitigation measures monitoring
13 programs.

14 This application is based upon the memorandum in support and accompanying
15 declarations, the deemed by statute verified complaint in this action [which is incorporated by
16 reference], and such further evidence and argument that the Court may properly receive..

17 DATED: June 5, 2013

Respectfully submitted,

18 DOUGLAS W. NELSON
19 Madera County Counsel

20
21 By: 

22 ROBERT D GABRIELE, Assistant
23 Attorneys for Petitioner and Plaintiff
24 COUNTY OF MADERA
25
26
27
28

1 **MEMORANDUM IN SUPPORT OF EX PARTE**
2 **APPLICATION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY**
3 **INJUNCTION and/or STAY**

4 **I**

5 **The Legal Standards have been met for Issuance of a Restraining Order, Preliminary**
6 **Injunction, Stay**

7 The general rule regarding issuance of a temporary restraining order is set forth in
8 California Code of Civil Section 527, which provides in relevant part that:

9 “(c) No temporary restraining order shall be granted without notice to the
10 opposing party, unless both of the following requirements are satisfied:

11 (1) It appears from the facts shown by affidavit or by the verified complaint that
12 great or irreparable injury will result to the applicant before the matter can be
13 heard on notice.

14 (2) The applicant or the applicant’s attorney certifies one of the following to the
15 court under oath:

16 (A) That within a reasonable time prior to the application the applicant informed
17 the opposing party or the opposing party’s attorney at what time and where the
18 application would be made.”

19 However, in the context of a CEQA case, based upon a verified [or statutorily deemed
20 verified] complaint/petition, pursuant to CCP § 1094.5 and pursuant to CCP § 1085, a stay of
21 process and proceedings or injunctive relief is available without a showing of irreparable harm
22 but merely legally cognizable harm to plaintiff/petitioner if not granted by comparison to the
23 harm to the respondent/defendant and real party in interest if granted plus a likelihood that the
24 plaintiff/petitioner will prevail. See *IT Corp v County of Imperial* (1985) 35 Cal 3rd 63, 69-70.

25 Further, as to the likelihood of plaintiff/petitioner prevailing all that must be shown is that
26 there is just a reasonable possibility of success. See *Baypoint Mort. Corp. v Crest premium*
27 *Real Estate Investments Retirement Trust* (1985) 168 Cal App 3rd 818, 824.

28 Regardless, ultimately the trial Judge has great discretion to issue or not issue based on
his/her determination of what IS in the public’s best interests. *West Coast Home Improvement*
Company v Contractors’ State License Board (1945) 68 Cal App 2d 665; *Sterling v Santa*
Monica Rent Control Board (1985) 168 Cal App 3rd 176, 187. And, the Court’s discretionary

1 authority in CEQA cases to do justice is emphasized in, Public Resources Code Section
2 21168.9 which in relevant part provides: “[e]xcept as expressly provided in this section,
3 nothing in this section is intended to limit the equitable powers of the court.”
4

5 II

6 **Denial of the Application for a Restraining Order, Injunctive Relief or a Stay Will Harm the County, Will Harm the Public, Will Harm Environment**

7 As set forth in the accompanying declaration of Madera County Planning Director
8 Norman L. Allinder, the County, the Public and the Environment are being harmed as the City
9 fails to comply with the document maintenance and the monitoring/enforcement requirements
10 applicable to the MMRs relating to air quality, noise, biological, archeological and
11 traffic/transportation elements: Paragraphs: 10, 11, 12 re Air; Paragraphs: 13, 14 re: Biological;
12 Paragraphs: 14, 15 re: Cultural; Paragraphs: 16, 17 re Noise and paragraphs: 18, 19 re:
13 Traffic/Transportation; and, serious or Irreparable Harm: Paragraph: 20. The declaration of
14 Planner III Jerome Keene confirms air quality violations on site constituting environmental
15 harm due to no enforcement of the requirement to control “fugitive dust” loose dirt flying in
16 the air due to grading activity [Paragraphs: 3a, 3b, 3c]; and noise violation by failure to enforce
17 the City Code regarding times of lawful construction activity [Paragraph: 2d]. And, the
18 Declaration of Kheng Vang, County Engineer, establishes that grading will continue for many
19 months and is perhaps only 50% complete.
20
21

22 III

23 **Harm to RPI Is Minimal And Only Financial If Court Grants Relief**

24 Per the Complaint/petition, RPI delayed the project because of successful litigation
25 referred to [Petition: P5, L27 – P6, L5, P6 – L24 – P27, L2] that challenged the approval
26 process and findings by City of Fresno. Because City and RPI failed to comply with the
27 MMRs they illegally are in effect ahead of lawful scheduling as they should not have
28

1 proceeded unless/until City of Fresno enforced the MMRs by documented on-site inspections
2 and date "sign-offs" as to each MMR. Allowing an illegally proceeding un-monitored project
3 to proceed simply because the developer may delay or lose some money or business
4 opportunity cost is pale by comparison to the harm to the county, to the public and to the
5 environment.

6 IV

7 **Harm to City of Fresno Is Minimal If any at All If Court Grants Relief**

8
9 The City of Fresno might argue that its administrative process will be unnecessarily
10 hampered and delayed; and, unnecessary because the Court can't issue an order to merely
11 comply with the law—which the City of Fresno is already required to do! However, such
12 argument fails in that since the City has not shown it to be trustworthy to actually monitor as
13 required, County of Madera seeks an Order that sets for specific scheduling and accountability
14 reporting to allow for verification that City of Fresno is now monitoring and requiring
15 compliance by actually enforcing the MMRs. The administrative burden to the City of Fresno
16 would be minimal to non-existent as it was already required to enforce the MMRs.
17

18 V

19 **The Application for Restraining Order, Preliminary injunction, Stay Is NOT** 20 **Moot and the City and RPI Have Not Been Forthright With The County**

21 In an email dated May 30, 2013 @ 4 PM from the RPI's attorney, with the knowledge
22 and apparent complicity of the City Attorney and staff in-house attorneys because they all were
23 copied on the email to County Counsel, made a material representation of fact to the County
24 Counsel in an attempt to lead County personnel to believe that
25

26 "I've been told that the grading is now 99% complete so that stopping it won't be
27 of much benefit to anyone. Further, given the state of the grading, the general
28 rule that injunctive relief won't be granted to prohibit a completed act will
probably bar the issuance of a TRO. *Griffith v. Department of Public Works*, 52
Cal.2d 848, 853 (1959)(the trial court correctly refused to enjoin the construction

1 of a freeway when the evidence showed that the construction was virtually
2 complete). Under these circumstances, and in light of the fact that DCTN3 will
3 continue to comply with the on-going mitigation conditions and that the City has
4 stated that it has been monitoring, and will presumably continue to monitor, that
5 compliance, I hope that the County will see fit not to go forward with seeking the
6 TRO. Ken" [Gabriele Declaration: Exhibit 1, page 3]

7 Such statement was on 5/30/13 @ 4:00 PM, and remains, a false portrayal of the "state
8 of the grading." The Declaration of the County's Engineer, Kheng Vang establishes that there
9 remains up to 50% or more of the grading yet to be completed, which will take numerous
10 months.

11 Misrepresentation of a material fact from the RPI's attorney is not excused because he
12 stated "I've been told," [as before he made such representation and utterance "of fact", the
13 professionally expected practice would be to "confirm it" before using it a basis to attempt to
14 convince the County Counsel to not bring these violations to the Court's attention on Thursday.
15 It is somewhat remarkable [and not explained] as well in that just 25 hours earlier, the RPI
16 attorney represented as fact that "the grading is 85 to 90% finished," in his 5/29/13 email @
17 3:05 PM [Gabriele Declaration: Exhibit 1, Page 35] It does show an apparent pattern of
18 failing to come forward truthfully, as the City failed to show it did the enforcement monitoring
19 it was obligated to do; yet its outside attorney represented to County Counsel [also to persuade
20 the County Counsel to refrain from proceeding to present these violations to the Court on
21 Thursday] by email May 30, 2013 @ 2:44 PM, that the City was prepared to file declarations
22 that the City in effect "complied!"

23 The accompanying declaration of Assistant County Counsel Robert D. Gabriele,
24 establishes that on May 30, 2012 by email with confirmed receipt and acknowledgment that the
25 notice requirement under Civil Code section 527 (c)(2)(A) has been met. Further, the
26 declaration provides the email exchange with the City Attorneys and the RPI attorney during
27 which the Assistant County Counsel asked the following:
28

1 "Ken

2 I think the simplicity to the County request is clear--what documents are there that
3 establish compliance? County does not accept [nor would City nor would you if
4 you were representing County], and the Court will likely not accept, mere
5 declarations of compliance [which are mere beliefs/conclusions/opinions] versus
6 records showing specific action that addresses what the MMRs expressly require
7 [it's not my argument, it's what the City in its MMRs expressly required to be
8 documented by the RPI and the City]. So, it really isn't just what docs the City
9 has or doesn't have [we already know the dearth of docs the City provided], but
10 what objective evidence does the RPI consortium have to establish what it/they
11 did that supports representation that they did what they were required to do?

12 If you have docs that to date City has failed and thereby refused to provide
13 [despite repeated opportunities and time to do so thru this minute], which show
14 compliance as to each of the MMRs before the 1st grading permit was [and any
15 other permits were] issued AND the grading was stopped/shut down when the
16 winds [specific MMR] exceeded 20 miles per hour [which we have evidence
17 didn't happen] or that "fugitive dirt/dust" [specific MMR] has been properly
18 avoided [which we have fotos it has not been] it all raises credibility questions of
19 all speakers who represent that there was/is 'compliance' that can only be
20 resolved with records that to this minute remain non-existent or inexplicably not
21 provided.

22 County speaks with foundation, with evidence, not merely words.

23 I ask again? Where is the objective evidence of compliance? If it exists, please be
24 so kind as to share that with the County as repeatedly requested."

25 As established by the declarations of Norman Allinder and Jerome Keene and Engineer
26 Kheng Vang the documents provided by the City and by RPI do not Show compliance as
27 required by CEQA and City's own MMRs requirements but Merely provide an incomplete
28 accumulation of records and are unreliable in reporting compliance.

29 VII

30 County Is Not Required To post a Bond or Undertaking

31 Per Code of Civil procedure section 995.220, the County is not required to post a bond
32 or undertaking to obtain a Temporary restraining Order or other injunctive relief.
33
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VII

CONCLUSION

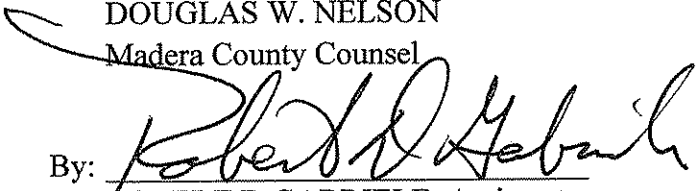
Accordingly, the County of Madera respectfully requests that the Court issue an a temporary restraining order, a preliminary injunction and or a stay against any further proceeding with the El Paseo Project unless and until the City of Fresno provides to the reasonable satisfaction of this court proof that it is properly enforcing the MMRs in accordance with a schedule and accountability to be fashioned in Court consistent with a reasonable schedule and verifiable accountability upon inspection. .

DATED: June 5, 2013

Respectfully submitted,

DOUGLAS W. NELSON
Madera County Counsel

By:


ROBERT D GABRIELE, Assistant
Attorneys for Petitioner and Plaintiff
COUNTY OF MADERA

PROOF OF SERVICE
(Code Civ. Proc. Secs. 1013a, 2015.5)

1. I do hereby declare that I am a citizen of the United States, employed in the County of Madera, over 18 years old, and that my business address is 200 West 4th Street, Madera, California 93637. I am not a party to the within action.

2. I served the foregoing **EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION and/or STAY; MEMORANDUM OF POINTS AND AUTHORITIES (Code of Civ.Proc. § 527; CCP § 1094.5; CCP§ 1085)** (Fresno Superior Court Case No. 13CECG00807) on the persons named below by enclosing a true copy thereof in a sealed envelope addressed as shown below AND

_____ depositing said envelope(s) with the United States Postal Service with the postage thereon fully prepaid.

_____ placing said envelope(s) for collection and mailing on the date and at the place shown in item 3 following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

_____ By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

 X By E-Mail or Electronic Transmission. I caused the documents to be sent to the persons (at the e-mail addresses) listed below.

_____ personal service on the person listed below.

3. a. Date of Service: June 5, 2013

b. Time of Service: _____

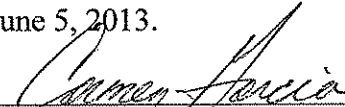
NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED:

TIM CREMIN, PRINCIPAL
MEYERS NAVE
555 12TH STREET, SUITE 1500
OAKLAND, CA 94607
E-mail: tcremin@meyersnave.com

KENNETH B. BLEY, ESQ.
COX, CASTLE, & NICHOLSON LLP
2049 CENTURYPARK EAST, 28TH FLOOR
LOS ANGELES, CA 90067-3284
E-mail: kbley@coxcastle.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED at Madera, California, June 5, 2013.


CARMEN GARCIA